IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES TSA LOCAL 1
80 F Street, N.W.
Washington, D.C. 20001, and

EUGENE LEIMER
1277 Tyler Road
Bridgeport, NY 13030, and

DON CARD
135 Longdale Dr.
Liverpool, N.Y. 13090, and

BEATRICE CAMPBELL
2735 Burning Tree Lane
Suffolk, VA 23435, and

THOMAS MORIARTY
2248 Mansion Cross Lane
Virginia Beach, VA 23456, and

JONATHAN THORTON
808 Allegheny River Blvd.
Oakmont, PA 15139-1401,

Plaintiffs,

v.

JAMES M. LOY, in his official capacity as Administrator,
Transportation Security Administration
U.S. Department of Homeland Security
400 7TH Street, S.W.
Washington, D.C. 20590,

Defendant.

CASE NUMBER 1:03CV01719

JUDGE: Colleen Kollar-Kotelly

DECK TYPE: TRO/Preliminary Injunction

DATE STAMP: 08/13/2003

CIVIL ACTION NO. _____

1

CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs bring this action to challenge the reduction in force in violation of the Aviation and Transportation Security Act (ATSA) by Defendant James M. Loy, Administrator, Transportation Security Administration (TSA), U.S. Department of Homeland Security (DHS). In May 2003, Defendant announced that it would reduce its security screener workforce by approximately 6,000 employees. The reduction in force (RIF) would take place in two stages, the first by June and the second by September 2003. Defendant based the decision of whom to RIF on impermissible, arbitrary and capricious standards. Specifically, Defendant's standards (1) place undue emphasis on disciplinary actions, (2) do not consider veterans' preference, (3) do not preserve permanent before temporary employees, (4) do not consider length of federal service, (5) do not distinguish between job classifications, and (5) do not create restoration rights. Furthermore, Defendant targeted union activists and employees over the age of 40 years old.

Plaintiffs seek this Court to declare the RIF standards used by the Defendant a violation of the ATSA and impermissible, arbitrary and capricious pursuant to the Administrative Procedure Act (APA). Plaintiffs further seek this Court to declare the RIF standards used by the Defendant a violation of the 1st Amendment of the U.S. Constitution, 5th Amendment of the U.S. Constitution, Veterans' Preference Act of 1944, and the Age Discrimination in Employment Act (ADEA). Plaintiffs request an order requiring the Defendant to create a RIF procedure with lawfully required safeguards, including but not limited to veterans' preference, retention registers, and restoration rights. Plaintiffs request an order requiring TSA to create retention registers based on their pre-RIF workforce. Plaintiffs further ask the Court to order the Defendant to restore employees who were inappropriately RIFed, including but not limited to the Plaintiffs.

JURISDICTION

1. Jurisdiction over this action is conferred upon the United States District Court by 28 U.S.C. §1331. Plaintiffs also seek a declaratory judgment under 28 U.S.C. §2201 and further relief under 28 U.S.C. §2202.

VENUE

2. Venue is properly laid before this Court in accordance with 28 U.S.C. §1391(e).

PARTIES

3. Plaintiff American Federation of Government Employees TSA Local 1, AFL-CIO (TSA Local 1) is a labor organization chartered by the American Federation of Government Employees, AFL-CIO (AFGE). AFGE represents approximately 600,000 federal government employees throughout numerous federal government departments and agencies. Its headquarters is located at 80 F Street, N.W., Washington, D.C. 20001. AFGE represents the interests of employees within its bargaining units by, among other things, negotiating collective bargaining agreements, arbitrating grievances, filing unfair labor practices, lobbying, and litigating employees' collective and individual rights in the federal courts. On March 3, 2003, AFGE chartered TSA Local 1 for TSA security screeners. Thirteen TSA security screeners from various U.S. airports are the founding members of AFGE TSA Local 1. Since its founding, more than 500 security screeners throughout the country have joined.
4. Plaintiff Eugene Leimer was employed as an airport security screener with the TSA at the Syracuse Hancock International Airport beginning October 20, 2002. He was a probationary,

permanent (non-temporary) employee. On or about May 23, 2003, he was laid off as part of the RIF. His letter of separation stated that his "separation is due to overstaffing resulting from budget allocations and is not for cause." [Emphasis in original]. Plaintiff Leimer was born on September 10, 1944. He is a veteran of the United States Navy. He served from 1963 to 1967 when he was honorably discharged with a 50% service connected disability. During his service, during the Vietnam War, he was deployed on a submarine and was also a SEABEE (Construction Battalion). While employed by TSA, Plaintiff Leimer was an AFGE activist. Plaintiff Leimer was proud of his union activity and on or about January 12, 2003, wrote a letter to Federal Security Director (FSD) Milano in defense of unions and unionism.

5. Plaintiff Don Card was employed as an airport security screener with the TSA at the Syracuse Hancock International Airport beginning September 9, 2002. He was a probationary, permanent (non-temporary) employee. On or about May 30, 2003, he was laid off as part of the RIF. His letter of separation stated that his "separation is due to overstaffing resulting from budget allocations and is not for cause." [Emphasis in original]. Plaintiff Card was born on May 20, 1943. He is a veteran of the U.S. Army. He served from April 22, 1965 – April 22, 1967, during the Vietnam War. He received an honorable discharge. While employed by TSA, Plaintiff Card was an AFGE activist. Management knew of his union activities and he was disciplined by TSA for lawfully discussing the union while off duty at the airport's break room.

6. Plaintiff Beatrice Campbell was employed as an airport security screener with the TSA at the Norfolk International Airport beginning September 29, 2002. She was a probationary, permanent (non-temporary) employee. On or about May 30, 2003, she was laid off as part of the RIF. Her letter of separation stated that her separation was not for cause. Plaintiff Campbell was born on February 28, 1946. She was not employed by the federal government or military before

her employment with TSA.

7. Plaintiff Thomas Moriarty was a screening supervisor at Norfolk International Airport beginning March 24, 2002. He was a non-probationary, permanent (non-temporary) employee. On May 30, 2003, he was laid off as part of the RIF. His letter of separation states that he is being separated "due to overstaffing resulting from budget allocations and is not for cause." Plaintiff Moriarty was born on October 2, 1954. Before his employment at TSA, he had 24 years of creditable service with the U.S. Navy. He was honorably discharged from the Navy and has a service related disability of at least 30%. Plaintiff Moriarty was an AFGE activist while employed with TSA. Management knew of his activism as they maintained a list of union supporters and upon information and belief, he was on that list.

8. Plaintiff Jonathan Thorton was employed as an airport security screener with the TSA at the Greater Pittsburgh International Airport beginning August 18, 2002. He was a probationary, permanent (non-temporary) employee. On or about May 23, 2003, he was laid off as part of the RIF. Her letter of separation stated that his separation was not for cause. Plaintiff Thorton is not over 40 years of age. He is a veteran of the U.S. Army. He served for 14 years and was honorably discharged. Plaintiff Thorton was an AFGE activist and a member of AFGE's TSA Local 1.

9. Defendant James M. Loy is the Administrator of the Transportation Security Administration (TSA). He is being sued in his official capacity.

CLASS ALLEGATIONS

10. This action is brought and may be properly maintained as a class action pursuant to Fed. R. Civ.

P. 23 and Local Rule 23.1. Plaintiffs seek certification of the following class: (a) TSA Security Screeners who were laid off as part of the RIF, i.e. without cause due to budget constraints; and (b) TSA Security Screeners who are currently employed but subject to lay off due to the upcoming RIF.

11. The exact number of Plaintiff class members is currently unknown, however, Plaintiffs believe that the class is so numerous that joinder of all members would be impracticable. Plaintiffs estimate that Class A is approximately 2,000 employees. This estimate is based on the TSA news releases from April and May 2003 that stated 6,000 employees were to be reduced, approximately half by the end of May 2003 and the rest by September 2003. However, TSA was first going to terminate for cause and only then RIF. Later TSA news releases stated that more than 1,000 TSA security screeners were terminated for cause based on the findings of delayed suitability and background checks. Plaintiffs estimate that Class B is approximately 48,000 employees, the current number of employees.

12. Questions of fact and law are common with respect to each class member. Common questions include:

    a. Whether Defendant violated ATSA when it failed to follow FAA RIF procedure;

    b. Whether Defendant violated ATSA, the Veterans' Preference Act of 1944, as amended, when it failed to preserve veterans' preference;

    c. Whether Defendant violated the Administrative Procedure Act (APA) by failing to properly establish RIF procedures;

    d. Whether Defendant violated the Age Discrimination in Employment Act (ADEA) when it disparately impacted employees over the age of 40 years;

    e. Whether the Defendant violated the 1st Amendment of the U.S. Constitution when it targeted

union activists for the RIF;

f. Whether Defendant violated the 5th Amendment of the U.S. Constitution when it abrogated its employees' liberty interests; and

g. Whether, as a result of Defendant's arbitrary and capricious RIF standard, Plaintiffs are entitled to restoration and/or to be maintained in their positions until a lawful RIF procedure is implemented.

13. The claims of the individually named Plaintiffs are typical of the claims of the Plaintiff class members. Plaintiffs and all members of the Plaintiff Class have been similarly affected by the Defendant's common course of conduct. The claims of all class members depend on a showing of Defendant's common implementation of an arbitrary and capricious RIF standard. When the RIF standard is determined to be unlawful, Plaintiffs, individually and as a class, will have the right to the relief sought herein.

14. There is no conflict as between Plaintiffs and the other members of the class with respect to this action or the claims for relief. Plaintiffs know and understand their asserted rights and their roles as class representatives.

15. Plaintiffs and their attorneys are able to and will fairly, and adequately, protect the interest of the class. Attorney Mark D. Roth and Charles A. Hobbie are experienced litigators and will be able to supervise other experienced staff in conducting the proposed litigation. Plaintiffs' attorneys can vigorously prosecute the rights of the proposed class members.

16. Separate actions by individual Plaintiffs will create the risk of inconsistent and varying results that may establish incompatible standards.

FACTS

17. In 2001, Congress enacted the Aviation and Transportation Security Act, Pub. L. 107-71, in part, in order to federalize security screening operations for passenger air transportation and intrastate air transportation under 49 U.S.C. §§44901 and 44935. The ATSA created the TSA and as such, defines that agency's duties and authorities.

18. The ATSA explicitly mandates the recognition of veteran's preferences as part of the employment standards for screening personnel and in particular for hiring. Pub.L. 107-71, §111(2)(f)(2).

19. The ATSA explicitly mandates that within a year, the Defendant shall deploy "a sufficient number of Federal screeners" to conduct the screening of all passengers. Pub.L. 107-71, §110(c)(1).

20. The ATSA explicitly mandates that the Federal Aviation Administration's (FAA) personnel management system as defined in 49 U.S.C. §40122 shall apply to employees of the TSA. Pub.L. 107-71, §101(n).

21. The FAA system, set forth in 49 U.S.C. §40122, in turn, provides the FAA with the general right to create "a personnel management system for the Administration that addresses the unique demands on the agency's workforce." §40122(g)(1).

22. Pursuant to §40122(g)(1), FAA expressly incorporates the provisions of Title 5 relating to sections 3308-3320 for veterans' preference.

23. Pursuant to §40122(g)(1), FAA also promulgated RIF policies found at FAA Order 3350.2C (10/17/94) and must be read in conjunction with later FAA amendments pertaining to appeal rights (FAA PMS, PRIB#17), performance appraisals (PRIB #16), agency status as a whole, and career transition assistance (HRPM EMP-1.22 and EMP 1.9).

24. Order 3350.2C includes as part of its RIF procedures the requirement of retention registers, veteran's preference, preference for permanent as oppose to temporary employees, consideration for length of federal service, and re-employment rights.

25. The FAA RIF procedures are consistent with the Veterans' Preference Act of 1944.

26. On March 28, 2003, Defendant Loy wrote to TSA screeners and informed them that there would be a reduction in force of up to 3,000 security screeners.

27. On or about April 30, 2003, Defendant Loy announced that up to 6,000 security screeners would be reduced in force by September 30, 2003.

28. In a May 30, 2003 press release, Defendant Loy explained that TSA was basing its selection of whom to reduce in force on job performance. Specifically, the May 30, 2003 press release that stated in relevant part

> Whenever possible, normal attrition, including resignations and retirements, is being used for rightsizing at individual airports. Employees may be terminated for cause, including criminal background, failure to pass drug and alcohol tests, and falsification of employment documents. Beyond that, the actual reductions in force are based on job performance.
>
> Qualified screeners at airports with too large a work force may seek transfers to airports needing screeners. A partial relocation stipend is available for screeners who transfer to certain airports. Screeners also have the opportunity to transfer from working full-time to working part-time, and TSA will soon start making such transfers.

29. In May, TSA began laying off security screeners as part of this RIF.

30. Plaintiffs were all separated in May 2003. Their separation letters stated that separation was as a result of overstaffing resulting from budget allocations and "not for cause."

31. Plaintiffs Leimer, Card, Moriarty, and Thornton were all eligible for veterans' preference.

32. Plaintiffs Leimer, Card, Campbell, and Moriarty are all over the age of 40 years.

33. All Plaintiffs were union activists.

34. On or about June 6, 2003, after the RIF had already begun at various airports, TSA recalculated the number of screeners needed at each airport.

35. On or about June 13, 2003, in a memorandum to TSA Screeners from Richard Whitford, Assistant Administrator of Human Resources and James Schear, Deputy Assistant Administrator of Airport Operations, the screeners were assured that screeners reduced in force – both past and future – would be "given priority consideration for screener positions if vacancies open up again in their airport." The same memorandum further explained that all airports would be given a "Conduct Checklist" and all screeners will be required to complete a competency-based assessment for determination of who will be RIFed in the second round of RIF.

36. On or about July 3, 2003, Assistant Federal Security Director (AFSD) Liddel from Hancock International Airport announced that the airport needed to hire additional security screeners. In response to the question whether those security screeners already laid off by the RIF would be restored, AFSD Liddel stated "no way" and cautioned the security screeners "do not make waves."

37. On July 11 and 18, 2003, Defendant issued a press release that it was recruiting new screeners for hiring at various airports throughout the country.

COUNT I

38. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 37 above.

39. The TSA RIF standard violates ATSA as it does not follow FAA RIF procedures and (1)

places undue emphasis on de minimis memoranda of counseling and/or disciplinary actions, (2) does not preserve permanent before temporary employees, (3) does not distinguish between positions (4) does not consider length of federal service, (5) does not preserve veterans' preference and (6) does not create restoration rights.

COUNT II

40. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 39 above.

41. The RIF procedure violates ATSA and the Veterans' Preference Act of 1944, Pub.L.No. 359, chp. 287, §12, 58 Stat. 390 as codified in 5 U.S.C.A. §3501 *et seq.* , in that it does not give due effect to tenure of employment, military preference, length of service, and efficiency ratings.

COUNT III

42. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 above.

43. The TSA RIF "standard" is arbitrary and capricious agency action in violation of the APA, 5 U.S.C. §706.

COUNT IV

44. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 43 above.

45. Plaintiff Leimer exhausted administratively. Specifically, pursuant to 29 CFR 1614.105, on or about June 11, 2003 Plaintiff Leimer timely requested informal counseling for his allegations of age discrimination. On or about July 17, 2003, pursuant to 29 CFR 1614.201(a), Plaintiff Leimer gave the Commission notice of intent to file suit.

46. The RIF procedure violates the Age Discrimination in Employment Act (ADEA), 29 USCA

§ 621 et seq., in that it disparately impacts employees over 40 years old.

COUNT V

47. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 46 above.

48. Defendant violated ATSA in that it did not deploy within the year requirement "a sufficient number of Federal screeners" to conduct the screening of all passengers.

COUNT VI

49. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 48 above.

50. The RIF standard as applied disparately impacted on union activists and as such abrogates Plaintiffs' right of free association under the First Amendment of the U.S. Constitution.

51. There are no comprehensive administrative procedures available which could provide a meaningful remedy Defendant's violation of Plaintiffs' First Amendment right of free speech.

COUNT VII

52. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 51 above.

53. Although the termination letters to those employees RIFed read that they are not due to cause, the Defendant has advertised through its press releases it selected employees for the RIF based on prior disciplinary incidents or for poor job performance.

54. The RIF standard as applied abrogates Plaintiffs' due process and liberty interests under the Fifth Amendment of the U.S. Constitution.

55. There are no comprehensive administrative procedures available which could provide a

meaningful remedy Defendant's violation of Plaintiffs' Fifth Amendment rights.

WHEREFORE, Plaintiffs pray that this Honorable Court enter an Order:

(1) Declaring that Defendant violated ATSA when it implemented RIF standards that (1) place undue emphasis on disciplinary actions, (2) do not consider veterans' preference, (3) do not preserve permanent before temporary employees, (4) do not consider length of federal service, (5) do not distinguish between positions, and (6) do not create restoration rights;

(2) Declaring that Defendant violated the Veterans' Preference Act of 1944, as amended;

(3) Declaring that the RIF standard is impermissible, arbitrary and capricious;

(4) Declaring that Defendant violated the ADEA;

(5) Declaring that Defendant abrogated Plaintiffs' right of free association under the First Amendment as it applied the RIF standard;

(6) Declaring that Defendant abrogated Plaintiffs' Fifth Amendment rights as it applied the RIF standard;

(7) Declaring that Defendant violated ATSA when it did not deploy the correct number of screeners within the year as required;

(8) Ordering Defendant to create a RIF procedure that is consistent with ATSA and the FAA RIF procedure;

(a) Ordering Defendant to create a retention register based on the pre-RIF employment logs which (1) does not place undue emphasis on disciplinary actions, (2) considers veterans' preference, (3) preserves permanent before temporary employees, (4) considers length of federal service, and (5) distinguishes between positions, i.e.,

passenger screeners, baggage screeners, lead screeners, and supervisory screeners;

(b) Ordering Defendant to create a RIF procedure with restoration rights;

(9) Restore Plaintiffs' employment with backpay, benefits and interest;

(10) Restore TSA employees inappropriately RIFed as a result of Defedant's failure to have appropriate retention registers;

(11) Enjoin Defendant from future RIF without proper and lawful RIF procedures;

(12) Ordering Defendant to pay Plaintiffs' attorney fees and costs; and

(13) Granting such other relief as this Court finds necessary and proper.

Respectfully submitted,

Mark D. Roth (D.C. Bar #235473)
General Counsel

C.A. Hobbie (mor)
Charles A. Hobbie
Deputy General Counsel

Gony Frieder (D.C. Bar #457706)
Staff Counsel- TSA Local 1
American Federation of Government Employees,
AFL-CIO
80 F Street, NW
Washington, D.C. 20001
(202) 639-6434

Attorneys for Plaintiffs